

The Honorable Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

DREW MACEWEN, *et al.*,

Plaintiffs,

VS.

GOVERNOR JAY INSLEE, in his official capacity as the Governor of Washington,

Defendant.

NO. 3:20-cv-05423-BHS

DEFENDANT GOVERNOR
JAY INSLEE'S LCR 7(g)
SURREPLY MOVING TO STRIKE
PORTIONS OF PLAINTIFFS'
REPLY AND SUPPORTING
DECLARATION OF
DR. VINCENT SEAMAN

DEFENDANT'S LCR 7(g) SURREPLY
MOVING TO STRIKE PORTIONS OF
PLAINTIFFS' REPLY AND
SUPPORTING DECLARATION
NO. 3:20-CV-05423-BHS

I. INTRODUCTION

For the first time on reply, Plaintiffs introduce a new declaration from Dr. Vincent Seaman, Dkt. #39, a self-identified epidemiological expert offered to support Plaintiffs' primary factual contention in this lawsuit—their allegation that COVID-19's "threat is almost exclusively confined to certain vulnerable groups." Dkt. #13 ¶ 148; *see, e.g.*, Dkt. #39 ¶ 39 (opining that "a well-defined and relatively small sub-population is most at risk for serious illness and/or death from COVID-19"). Although Plaintiffs describe Dr. Seaman as a "rebuttal" expert, Dkt. #37 at 3, he in fact does not rebut any evidence adduced by the Governor, nor even attest to having read either the Governor's Response or the Declaration of Dr. Kathy Lofy. *See* Dkt. #39 ¶ 11 (identifies all materials reviewed). The Seaman Declaration is not a rebuttal submission and should be stricken as new expert material that must have been included in Plaintiffs' Motion.

13 Plaintiffs’ reply also develops a new legal argument, namely that Proclamation 20-19,
14 which suspends most residential evictions during the COVID-19 crisis, violates the Takings
15 Clause. *See* Dkt. #37 at 12–14. Not only did Plaintiffs’ Motion for Preliminary Injunction not
16 develop this argument—burying its single passing reference to Proclamation 20-19 on page 28—
17 but Plaintiffs’ Amended Complaint does not so much as mention Proclamation 20-19, let alone
18 plead a claim against it. The Court should strike this new legal theory, too.

II. ARGUMENT

20 “It is well established that new arguments and evidence presented for the first time in
21 Reply are waived.” *Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash.
22 2006); *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1171 (W.D. Wash. 2010) (“Arguments
23 cannot be raised properly for the first time on reply.”). It is likewise improper on reply to file
24 declarations with new allegations. *Goldmanis v. Insinger*, No. C13-2035-JCC, 2014 WL
25 3739430, at *4 (W.D. Wash. July 29, 2014), *aff’d in part, dismissed in part*, 679 F. App’x 605
26 (9th Cir. 2017) (granting motion to strike reply declaration containing “new allegations not

1 addressed in the initial motion”). The proper remedy is to strike such material, and courts in this
 2 district routinely strike expert opinions and arguments that are improperly submitted on reply,
 3 *see, e.g., id.; Bund v. Safeguard Properties LLC*, No. C16-920 MJP, 2018 WL 5112642, at *3
 4 (W.D. Wash. Oct. 19, 2018), because they would otherwise “deprive[] the opposing party of an
 5 opportunity to respond,” *Horizon Air Indus., Inc. v. Airline Prof'l's Assoc.*, No. 2:13-CV-681
 6 RSM, 2014 WL 2896001, at *4 (W.D. Wash. June 25, 2014).

7 **A. The Court Should Strike Seaman Declaration and All References to It**

8 The Seaman Declaration, Dkt. #39, is full of new evidence to support Plaintiffs’ primary
 9 factual contention in this case—that “COVID-19 is a crisis of the very elderly, infirm, ailing
 10 population,” Dkt. #13 ¶ 32—and is thus improper material in support of their Reply. Plaintiffs
 11 could easily have foreseen the need for Dr. Seaman’s Declaration (which is, in any event, of
 12 negligible value), yet they never disclosed any intention to submit an expert declaration or
 13 identified him in their opening motion, Dkt. #14, depriving the Governor of any opportunity to
 14 respond to his assertions. Moreover, though Plaintiffs describe Dr. Seaman as a “rebuttal”
 15 declarant, they fail to identify what aspect of the Governor’s opposition materials he purports to
 16 rebut. The truth is, the Seaman Declaration is not rebuttal material at all, but rather introduces
 17 new purported evidence in support of the same factual assertions Plaintiffs made in their opening
 18 brief. *Compare* Dkt. #37 at 7 (“being infected with SARS-CoV-2 poses slightly less risk of
 19 adverse health consequences than being infected with the seasonal flu.”), *with* Dkt. #14 at 20
 20 (describing a flu pandemic as “even more deadly than COVID-19”). The Court should therefore
 21 strike the Seaman Declaration and all references to it. *Bund*, 2018 WL 5112642 at *3.

22 **B. The Court Should Strike All References to Proclamation 20-19**

23 Plaintiffs’ Reply argues that Proclamation 20-19, which imposes a temporary
 24 moratorium on most residential evictions, constitutes a taking. *See* Dkt. #37 at 12–14. As
 25 explained in the Governor’s Response, *see* Dkt. #31 at 27, the Amended Complaint does not
 26 plead a takings claim—a fact Plaintiffs do not appear to dispute, *see* Dkt. #37 at 12–14. Nor does

1 the Amended Complaint plead any claim against Proclamation 20-19, which it does not even
 2 mention. Though Plaintiffs' Motion references Proclamation 20-19 once, Dkt. #14 at 28,
 3 Proclamation 20-19 is not included in the Motion's Section entitled "Proclamations" in the
 4 "Facts In Support Of Motion," which specifically identifies only Proclamation 20-05,
 5 Proclamation 20-25 (which Plaintiffs correctly describe as a "stay-at-home order," *id.* at 4), and
 6 amendments to the latter, *id.* at 3–7. Likewise, Plaintiffs' Proposed Order requests a preliminary
 7 injunction against "enforcement of the stay-at-home orders," but does not mention Proclamation
 8 20-19 or the residential evictions moratorium. Dkt. #27 at 1.

9 On reply, Plaintiffs for the first time focus their takings claim (itself not pled) on
 10 Proclamation 20-19 and its "prohibition on eviction of any tenant whose tenancy is subject to
 11 the Landlord Tenant Act." Dkt. #37 at 13 & n.17. This is an improper expansion of their
 12 arguments and claims on reply, and if not stricken would deprive the Governor of the opportunity
 13 to respond. *See Jachetta v. United States*, 653 F.3d 898, 912 (9th Cir. 2011) (plaintiff
 14 "waived his argument . . . because he developed it for the first time in his reply brief"). The
 15 Court should therefore strike all references and argument related to Proclamation 20-19 in
 16 Plaintiffs' Reply. *Amazon.com LLC*, 758 F. Supp. 2d at 1171.

17 III. CONCLUSION

18 Because the Seaman Declaration and Plaintiffs' argument regarding Proclamation 20-19
 19 are new and not proper on reply, the Governor requests that the Court strike (1) the declaration
 20 of Dr. Seaman and all references to it, and (2) all references and argument related to Proclamation
 21 20-19 in Plaintiffs' reply brief.¹

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 25¹ The references to Dr. Seaman's Declaration in Plaintiffs' Reply that should be stricken are at pages 3:12–
 26 14, 4:6–8, 6:10–12, 6:23–25, and 7:1–11. The references to Proclamation 20-19 that should be stricken are at pages
 8:16–17, 9:13, 12:21–22, 13:10–11, 13:17–22 & n.17, 14:3–15, and 14:18.

1 Dated this 23rd of June 2020.

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